No. 6073

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

JOSEPH HAYDEN,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLANT

LONG & HAMMER,
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BRIEF OF APPELLANT

STATEMENT

The appellant herein, Joseph Hayden, hereinafter called the plaintiff, was inducted into the military service of the United States of America on the 19th day of September, 1917, and was honorably discharged therefrom on June 6, 1919. On December 3, 1917, he applied for and was granted war risk insurance in the sum of $10,000, said insurance being evidenced by certificate No. 959377 and he authorized the deduction of premiums from his army pay. The premiums

were paid thereon up to and including the month of June, 1919. On October 5, 1918, while with the United States army in France serving with the fourth division, plaintiff was struck in the back by a piece of high explosive shell and wounded. He lay there one day and was picked up the next morning and taken to the hospital and operated on. He was put into the casual division, sent back to the United States to New York and subsequently to Camp Lewis where he stayed to the date of his discharge, June 6, 1919. All of the time, from October, 1918, to June 6, 1919, he was in the hospital. By reason of the disability arising from the foregoing injuries plaintiff has claimed that he became permanently and totally disabled from following any substantially gainful occupation. That said disability dates from the 5th day of October, 1918, and that by reason thereof plaintiff is entitled to the benefits of his war risk insurance from said date (R. 1 through 3). By answer of defendant's, paragraph 4, the disagreement between the plaintiff and the defendant is admitted (R. 5).

THE ISSUE BRIEFLY STATED IS: WAS THE PLAINTIFF PERMANENTLY AND TOTALLY DISABLED WHILE THE WAR RISK INSURANCE WAS IN FORCE, PRIOR TO JULY 1, 1919?

The case was tried to a jury and upon the close of the plaintiff's case, the plaintiff having rested, the defendant moved for an involuntary non-suit. The court granted defendant's motion for an involuntary non-suit and from judgment entered thereon (R. 10) plaintiff appeals.

ASSIGNMENTS OF ERROR

Plaintiff will rely upon Assignments 1, 2, 3 and 4 (R. 47, 48, 49, 50, 51):

I.

That the District Court erred in sustaining defendant's objections to plaintiff's Exhibit II, marked for identification purposes, and that said court erred in rejecting plaintiff's Exhibit II when offered in evidence by the plaintiff. That said plaintiff's Exhibit II, marked for identification purposes, was by the plaintiff identified as a document received by the plaintiff from the Treasury Department, Bureau of War Risk Insurance, and that said plaintiff's Exhibit II is in substance a letter from the Treasury Department, Bureau of War Risk Insurance, awarding compensation to the plaintiff for disability resulting from an injury incurred in the line of duty while employed in active service.

II.

The District Court erred in sustaining defendant's objections to plaintiff's Exhibit III marked for identification purposes and that the court erred in rejecting said plaintiff's Exhibit III when offered in evidence by the plaintiff. That said plaintiff's Exhibit III was by the plaintiff identified as a letter received by the plaintiff in the mail from Mr. Popwell, Chief of the Bureau of Claims of the Veterans Bureau in Seattle, and that said plaintiff's Exhibit III is in substance a letter from R. L. Popwell, Chief of the Claims Division, Regional Office at Seattle of the United States Veterans Bureau stating the amount of the

award to the plaintiff per month on account of disability.

III.

The District Court erred in sustaining defendant's objections to the following questions asked by the Attorney for the plaintiff upon re-direct examination:

"Q. After you received total and permanent rating in June of 1922, what amount of money would that carry with it?

A. Per month?

Q. Yes.

A. $100.00.

Q. Now, prior to the time,—that time,—had you been drawing from the Government the amount of money upon a total disability rating?

MR. POPE: I object to that as another way of getting around the Court's ruling.

THE COURT: Sustained. Proceed.

MR. LONG: Exception."

IV.

That the District Court erred in granting defendant's motion for an involuntary non-suit at the close of plaintiff's case and that said court erred in withdrawing said cause from the jury at the close of plaintiff's case to which ruling the plaintiff took separate exception at the time of trial herein.

ARGUMENT

I.

Exclusion of Evidence

Plaintiff's first three assignments of error may be well discussed under one head as to exclusion of evidence. In an early part of the trial plaintiff offered in evidence Exhibit II and Exhibit III, the former being identified as a letter from the Treasury Department, Bureau of War Risk Insurance, awarding compensation to the plaintiff for disability resulting from an injury incurred in the line of duty while employed in active service, and the latter being identified as a letter from the Regional Office at Seattle of the United States Veterans Bureau, stating the amount of award to the plaintiff per month on account of disability. The questions to which objections were sustained by the Court as assigned in III were questions relating to the amount of disability which the plaintiff was receiving prior to June of 1922. In all three instances the evidence which was sought to be introduced was evidence of the disability rating which the Veterans Bureau had given to the plaintiff from the time of his discharge. It was competent evidence to show the extent of disability of the plaintiff. It was material to the case and it was error to exclude it.

II.

It Was Error to Grant Defendant's Motion for an Involuntary Non-suit

Plaintiff's Evidence Was Sufficient to Sustain the Burden of Proof

In passing upon the defendant's motion for a non-suit the District Court stated the test of the evidence which should be applied was "whether or not as a matter of law there would be support for a verdict in favor of the plaintiff provided the jury should so find, and in order to arrive at that determination the Court must determine the evidence as a jury would under the law and in a light as reasonably favorable to the plaintiff as the evidence will bear." Admitting that to be a fair test to be applied, the question here presented is whether under the particular facts of this case, viewed in a light as reasonably favorable to the plaintiff as the evidence will bear, there would be support for a verdict in favor of the plaintiff. If the evidence herein would lend support to such a verdict then the Court erred in granting the non-suit.

It was only necessary for the plaintiff to show that he was disabled to such an extent as to be unable to follow continuously any substantially gainful occupation and that such disability is founded upon conditions which render it reasonably certain that it will continue through the life of the person suffering from it. The question as to what constitutes a permanent and total disability under the War Risk Insur-

ance Act has been before the Court upon numerous occasions.

> "Total disability is any impairment of the mind or body which renders it impossible for the disabled person to follow continuously any substantial gainful occupation."
>
> *United States v. Law*, 299 Fed. 61.
>
> "The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such an impairment of capacity as to render it impossible for the disabled person to follow continuously any substantial gainful occupation."
>
> *U. S. v. Sligh*, 31 Fed. (2d) 735.

In the case of *United States v. Acker*, 35 Fed. (2d) 646, the following is said:

> "For a disability to be total within the meaning of the above referred to provision it is not necessary that the insured's condition be such as to render it impossible for him to engage in any substantial gainful occupation. It is enough that his condition be such as to render him unable in the exercise of ordinary care and prudence to engage continuously in any substantial gainful employment. Appellee's disability was not kept from being total by his intermittent business activities, if, without the exercise of ordinary care or prudence, they were engaged in at the risk of substantially aggravating the ailment with which he was afflicted."

Guided by these general views as to what consti-

tutes permanent and total disability the question in each case resolves itself into a question of fact as to whether the particular facts of a particular case show such permanent and total disability. The specific question with which we are concerned here is whether there was sufficient evidence to support a finding of the jury that there was a permanent and total disability prior to the last day of June, 1919, and in order to determine this question it becomes necessary to consider the evidence of this case. The plaintiff in his own testimony sufficiently established the fact that at the time of his discharge and that at all times since he has been unable to engage in any substantially gainful occupation. He testified that he was 39 years of age and that he had never had an education beyond the eighth grade. That on October 5, 1918, while in France serving with the Fourth Division he was struck in the back by a piece of high explosive shell and wounded. That he lay there for one day and was picked up the next morning and taken to the hospital and operated on. He was put in the Casual Division and sent back to the states. He was sent to Camp Lewis. He stayed at Camp Lewis until June 6, 1919, the date of his discharge. He testified that he was in the hospital all of the time from October, 1918, until the date of discharge (R. 22, 23). He testified that when he went home from the hospital in 1919 he was weak and had pains in the leg and in the back, and that about six months after his discharge he got a report from Washington, D. C., saying that from date of discharge he would receive total disability (R. 23). He did not do any work

when he got back from the Army during the year of 1919. He was able to walk fairly well but he was suffering pains in the legs and weakness and was nervous. In the latter part of 1919 he went in training with the Government in the City Light sub-station, Lake Union, where they were to teach him how to be a station operator. He did no work there, merely sitting in an easy chair. He was there two or three months and his testimony is that he did no real work while he was there (R. 24, 25). From there he was transferred to the Y. M. C. A. where they sought to teach him to be a wireless operator. He was in training there a few months, three or four, just attending classes (R. 25). From there in June or July, 1920, he was sent to Wilson's Modern Business College. He discontinued training there in 1921. During that time he took an examination for a postal clerk and tried to work at that for a few hours at a time. It tired him out though his work only lasted one to three hours in the evenings and he was not regularly employed (R. 24, 25). He testified that his legs would get numb and that he would have pains after working for any length of time. About January, 1922, he was called to the Veterans Bureau and sent to the Port Townsend Hospital (R. 26). He was there for a month. In May of that year he again attempted to do some work as a substitute clerk for the post office. The more he worked the worse he got and about June 15th he was forced to quit there and on the 16th of June he was sent to the Providence Hospital where he suffered a collapse and was sent to Portland, Oregon,

on the 29th of June, 1922, as a stretcher case, and stayed at Portland, Oregon, until August 9, 1923. Most of that time he was in bed. The work which he did was not steady and not regular work but was for two or three hours a day (R. 26). He testified that since the time he went to the hospital in June, 1922, he has done no work at all (R. 26). That his condition has been very poor and he has not had good use of his legs. That he has been weak and nervous. That he could hardly walk more than two or three blocks from home. That there had never been a time since discharge that he has been free from pain, and that there never had been a time since discharge when he could concentrate on his work to any degree (R. 27). The irregularity of his work and the irregularity of his attendance in his training and classes, both at the Y. M. C. A. and in Wilson's Business College, is brought out in the cross-examination (R. 27 through 30). He testified that in June, 1922, he received total and permanent rating for disability, carrying with it $100.00 per month (R. 31).

William G. Hayden, his brother, who has lived with him since the date of his discharge and who was in a position to observe his condition during all that period, testified that he had been very irritable, almost impossible to live with; that he had been that way ever since he came back and that whenever he worked he seemed to be worse (R. 32). Mrs. Emma Hayden, his mother, who was also in a position to observe him at all times since his discharge except when he was in the hospital, testified as to his nervous

condition and that he had been nervous ever since he came back from the war (R. 33). These are the facts and evidence of the plaintiff and of witnesses acquainted with the plaintiff having an opportunity to study his condition. Upon this evidence alone there is unquestionably evidence which would support a verdict of the jury for the plaintiff.

Dr. Stewart V. R. Hooker, physician and surgeon in Seattle, testified as to the condition of the plaintiff at the time of trial as based upon examination (R. 15):

> "I made a thorough examination of the plaintiff in the last few days. I found him suffering from transverse myelitis, which means a lesion of the spinal cord, which more or less paralyzes some muscles and some sensations below the point of lesion. This piece of shell entered the back about the level of the second lumbar vertebra, and evidently destroyed more or less of the nerve tissues. He is unable to walk well. He drags his left foot. There is an area of hypersensitiveness above the lesion, as we usually find in these cases." (R. 15-16) "We see here in the third lumbar spine that there has been a fissure,—a fracture,—right through there so that this part of the transverse process was loosened." (R. 17)

He demonstrated his testimony as to the injury to the spinal column upon plaintiff's Exhibit I, an X-ray. He testified that from his examination he found plaintiff had been hit by a shell which was going downward and inward when it hit and it in-

jured the transverse process and that when it hit his spine there was more or less of an explosive effect inside the spinal canal, and hemorrhage, with pressure on that spine, causing great damage to the spinal cord (R. 17). He further testified that it would be practically impossible for him to concentrate or study, and that it would be impossible for him to engage in physical exertion. That if he used his arms or any part of his body he would gradually go downward and would not last any time. "One or two days would probably be his limit on any steady occupation. In my opinion the same result would follow in occupations involving mental effort. In my opinion he will never be well." (R. 18) Dr. Hooker definitely testified that the cause of the transverse myelitis was due to being hit by the shell and was caused by trauma (R. 19).

Added to this testimony the records of the United States Veterans Bureau were in evidence introduced upon the testimony of O. G. Fairburn (R. 19) following the disability ratings of the plaintiff from discharge to date. They show from the first examination of the plaintiff a diagnosis of high explosive wound (R. 20). The ratings are as follows: "Temporary partial 20% from the date of separation of active service to April 28, 1921; temporary partial 10% from April 28, 1921, to January 6, 1922; total temporary from January 6, 1922, to January 30, 1922; temporary partial 10% from January 30, 1922, to June 16, 1922, and permanent total from June, 1922, to date." (R. 19-20) These ratings based upon various examinations are made as a result of ex-

amination of the doctors of the Veterans Bureau (R. 20). The total permanent rating appears to be based on an examination of June 27, 1922. The diagnosis shows transverse myelitis; pes planus; gunshot wound on back and abdominal wall healed, also wound contused; sacral plexus anterior crucial right side, also paralysis traumatic, nerves, sacral plexus right side, also tuberculosis chronic arrested; also myelitis transverse (R. 21-22). The history of the development of the disability as shown by the examination of June 27, 1922, discloses that following the gunshot wound of October, 1918, the lower limbs were entirely paralyzed and gradually the condition got better and remained stationary until a short time prior to the examination when the symptoms became worse (R. 22).

From all of this testimony there is one conclusion which we can arrive at conclusively and that is that at the time of the trial the plaintiff was permanently and totally disabled. Dr. Hooker's testimony is conclusive upon this point. The plaintiff's own showing of his inability to work and the records of the ratings in the Veterans Bureau establish without a doubt that he was permanently and totally disabled at the time of trial.

That this same condition and same disability was existent on June 27, 1922, is also conclusively shown by the evidence. Dr. Hooker testified that his disability was caused by transverse myelitis (R. 18, 19). The examination of June 27, 1922, discloses the condition of transverse myelitis then existent (R. 21). The rating given him at that time was that

of permanent and total disability (R. 20 and 21) and it needs no lengthy argument to show that the same condition upon which Dr. Hooker based his testimony to the effect that the plaintiff was permanently and totally disabled was existent in 1922 and was the basis for the rating at that time of permanent and total disability. The question then is whether or not prior to that time and prior to the last day of June, 1919, this same condition was present and the same disability existent. Our argument upon this question is ably stated in the case of *Marsh v. United States*, 33 Fed. (2d) 554, in the opinion by Martineau, District Judge, whose statement we think to be particularly applicable here. In that case the plaintiff had received a partial disability rating from the date of his discharge which was thereafter classed as a temporary total and subsequently changed back to temporary partial and finally classified as permanent and total. The Court said:

> "If the classifications given him by the Bureau may be taken as an indication of the progress of his disease, we must conclude that from the time of his discharge up to the present time his physical condition has grown gradually worse. Shortly after he was discharged he was classified as totally temporarily disabled. There has been no improvement in his condition, but subsequent facts and a better understanding of his ailment has demonstrated to the government physicians that his disability was permanent. If they were in doubt as to the nature of his disease

> or disability, it was perhaps entirely proper for them to classify it as total temporary, but, if after the lapse of time it is shown that the disability which he then had which was thought to be only temporary was in fact permanent, the court should classify it as a total permanent disability."

This is particularly applicable to this case. Here at the date of discharge plaintiff was given a temporary partial 20% rating. His rating continued as temporary and partial until June of 1922 when upon further examination it was changed to permanent and total. Subsequent facts and better understanding of his ailments had demonstrated to the Government physicians that his disability was permanent and total. Any doubt that there might have been as to the nature of his disease or disability has been dissolved and it is shown that he is permanently and totally disabled. From this evidence a jury may well draw a conclusion that the same disability has been existent from the date of the injury. The present case is not a case in which we have shown no cause of the condition. It is not a case where the question as to the time that the injury occurred is a question of inference. Dr. Hooker has testified that the gunshot wound received October 5, 1918, was the cause of the transverse myelitis (R. 19). The plaintiff's testimony shows that his condition had been substantially the same at all times since discharge (R. 24-26). The Government rating shows that at all times since discharge his disability has been based upon the gunshot wound (R. 20-21). No

subsequent injury has been shown, no subsequent occurrence or event that would cause permanent and total disability. The evidence clearly points to the fact that the disability was existent from the time that he received the gunshot wound, October 5, 1918.

The case of *La Marche v. United States*, 28 Fed. (2d) 828, was a case of an appeal in this Circuit from a directed verdict for the defendant and has many points in common with the present case. There the only testimony as to how, when or where the injury to the plaintiff occurred was that while under shell fire in France he was rendered unconscious and following this was subject to nervousness, and was confined frequently in hospitals, suffering from a nervous condition and pains through his body. The Court said:

> "We fully agree with the court that the testimony was sufficient on the question of total permanent disability, and that the question as to when, where, or how the injury to the hip was incurred was largely a matter of guess work and speculation; but the burden was only on the plaintiff to prove total permanent disability, and that such disability arose during the life of the policy. Mere inability on his part to prove the exact time and place of the injury to the hip was not fatal to his case if the jury was warranted in finding from the testimony that the injury and the accompanying disability occurred and existed during the life of the policy, and we think the testimony was sufficient to warrant such a finding. After August 4, 1919,

> the plaintiff in error was confined in hospitals for nearly a year and a half, and there is ample warrant for a finding of total permanent disability from and after that date. We think also the testimony would warrant a finding of total permanent disability at a much earlier date and while the policy was in effect. His condition and symptoms after August 4, 1919, did not differ materially from his condition and symptoms prior to that date, and if conditions existing on and after August 4 were attributable to the injury to the hip, might not the jury well find that similar conditions existing prior to that date arose from the same cause.
>
> "There was no evidence to compel a finding that the plaintiff in error received any injury between the date of the expiration of the policy and August 4, if indeed the testimony would warrant such a finding."

Here, as in that case, we think that the testimony warrants a finding of total and permanent disability at a time while the policy was in effect. Plaintiff's condition here did not differ materially from his conditions and symptoms at all times since discharge and if the conditions existing here on June 27, 1922, and to the date of trial, were attributable to transverse myelitis caused by the gunshot wound and injury to the spinal column, might not the jury well find that similar conditions existing prior to that time arose from the same cause? And here, as in the *La Marche* case, there is no evidence that the plaintiff received any injury between the date of

the expiration of the policy and the date that he received his rating as permanently and totally disabled. The development of the injury is linked up as a disability continuing in existence from the date that he received the gunshot wound on October 5, 1918.

If we were to disregard the medical evidence, the ratings of the Veterans Bureau, and the inferences therefrom and consider only the testimony of Joseph Hayden, the plaintiff, and of the two witnesses who knew him, we still believe that there is ample testimony that would warrant a jury in finding a total permanent disability from the date of October 5, 1918. Joseph Hayden's testimony discloses a pitiful condition, an inability to follow any substantially gainful occupation. His testimony discloses that he has tried to take training first in a light plant, then at a Y. M. C. A. school, and then at a business college, but that in all cases he has been unable to follow any occupation for any length of time. In the ultimate test of all these cases the ability which the plaintiff has demonstrated by his own actions as to whether he can or cannot follow continuously any substantial gainful occupation must be the test. This rule is supported by the case of *United States v. Acker*, 35 Fed. (2d) 646, where after considering the evidence the Court concluded:

> "As above indicated, a phase of the evidence supported a finding that appellee's disability was total within the meaning of the provision contained in the certificate sued on."

The rule is further borne out in the case of *United*

States v. Sligh, 31 Fed. (2d) 735, where the testimony as to the ability of the plaintiff to work was considered and the Court considering the testimony concludes that there was sufficient evidence from which the trial court could have concluded that there was a permanent and total disability. For further consideration as to the ability, as demonstrated by the work record of the plaintiff, as to whether or not he is able to follow a substantially gainful occupation, we cite the cases of *United States v. Elaisson*, 20 Fed. (2d) 821, and *Starnes v. United States*, 13 Fed. (2d) 212.

Taking then the facts of a finding by a doctor upon examination of permanent total disability at the time of trial, a rating of permanent and total disability by the Veterans Bureau since the 27th of June, 1922, together with the testimony of the plaintiff as to his inability to follow continuously a gainful occupation and the demonstration of this fact by the evidence as to his attempts to follow an occupation, and then considering that the injury, upon which the permanent total disability rating has been granted by the Veterans Bureau and upon which Dr. Hooker based his testimony, was an injury which has been existent and which occurred October 5, 1918, we submit that there is ample evidence to go to the jury, and that the jury would be warranted in finding that the plaintiff herein has been permanently and totally disabled from and since the date of October 5, 1918, when he received the gunshot wound.

Before concluding with the argument of the ap-

pellant we wish to call the attention of this Honorable Court to arguments used by the District Court in his ruling granting the motion for a non-suit which we believe are not proper considerations in such a case, and which we believe influenced and prejudiced the District Court in withdrawing the case from the jury. The Court stated:

> "This plaintiff was unfortunate, if he wanted his insurance, that he didn't keep up his premiums. Apparently he had no thought himself that he was totally and permanently (disabled) because he didn't find it necessary to bring this suit until nearly ten years later." (R. 37)

We submit to this Court that when the Congress of this country has seen fit in its benevolence to grant to the soldiers of this country a time within which they may bring a suit for their permanent and total disability, that that grant cannot be so indirectly taken away from the veteran by the ruling of the trial court. The question as to when the action was brought by the plaintiff has no place in the consideration of the evidence and is certainly not evidence from which a court can properly conclude that the plaintiff had no thought himself that he was totally and permanently disabled.

The District Court also in its ruling upon motion for non-suit stated:

> "This policy of insurance with the Government is like any other policy with any other insurance company. It is a contract entered between the insurer and the insured. * * *

It bears the same relation as the insured and the insurer in any other complaint."

We submit to this Court that this is not the view which this Court has taken of war risk insurance.

"War risk insurance established by the statute is not an out and out contract of insurance on an ordinary business basis nor yet a pension but that 'it partakes of the nature of both'."

United States v. Law, 299 Fed. 61.

"A policy of war risk insurance is more or less a gratuity from the Government and was so designed to be. The United States assumed all the extra risks of war and issued for the minimum premium what might be termed combined accident and life insurance policies largely in return for the sacrifices to be made by the men of the United States in defense of their country. These policies and the law generally are entitled to the most liberal construction in favor of the soldiers."

United States v. Cox, 24 Fed. (2d) 944.

"The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the Government to them, if not *paternal*, was at least *avuncular*. It was a relation of benevolence established by the Government at considerable cost to itself, for the soldier's good."

White v. United States, 70 Law Ed. 531, 270 U. S. 283, 46 Sup. Ct. Rep. 20.

We have cited these two instances in the trial court's ruling for the purpose of demonstrating that there was not an unprejudiced and an unbiased weighing of the evidence in this case upon the motion for non-suit and submit to this Court that the evidence has not been viewed in a light as reasonably favorable to the plaintiff as the evidence will bear. We conclude that from all the evidence in this case that there is ample evidence that would warrant the jury in finding that the total and permanent disability was existent from the date of October 5, 1918, and during the existence of plaintiff's contract of insurance, and we submit that the District Court erred in taking the case from the jury and granting defendant's motion for an involuntary non-suit.

It is respectfully submitted that the judgment of the trial court be reversed and the cause be remanded for trial.

Respectfully submitted,

LONG & HAMMER,
Attorneys for Appellant.